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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

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No. 74-649

JOSEPH BELLIZZI,

Petitioner,

v.

The Superior Court
of Stanislaus
County,

Respondent,

The People,

Real Party In
Interest.

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# Petition For A Writ of Certiorari To The Supreme Court Of The State Of California

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Petition For A Writ Of Certiorari
To The Supreme
Court Of The State Of California

The Petitioner, JOSEPH BELLIZZI, prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of the State of California rendered in these proceedings on July 11, 1974.

## Opinions Below

The opinion of the Supreme Court reported in 12 Cal. 3d 33, appears at Appendix A, infra, pages 21 - . The opinion of the Court of Appeal, reported in 37 Cal. App. 3d 109 appears at Appendix B, infra, pages 49-66. There is no written opinion by the trial court, the Superior Court of Stanislaus County, but the substance of that court's ruling was to deny a formal motion for dismissal on due process grounds with an alternative that the case be continued upon condition that Petitoner waive

any claim of prejudice by reason of the denial of a speedy trial. (Response, p. 67).[1]

## Jurisdiction

The judgment of the Supreme Court of the State of California was entered on July 11, 1974. See Appendix A, page 21, infra. Thereafter a Petition for Rehearing was filed in said Court pursuant to which the Court, on August 2, 1974, made an order extending its time within which to grant or deny said petition to September 6, 1974. See Appendix C, page 67, infra. Ultimately, and on August 28, 1974, the Petition for Rehearing was denied. See Appendix D, infra, page 68. This Petition for

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[1] Reference is to Petitioner's Response to Return On Order to Show Cause, part of the record before the Supreme Court.

Certiorari is being filed within 90 days from the last date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257, Subdivision (3).

## Questions Presented

Pursuant to the provisions of Sections 1084, 1085, and 1102 of the Code of Civil Procedure of the State of California, Petitioner applied to the Court of Appeal, State of California, Fifth Appellate District, for a Writ of Prohibition/Mandate to compel dismissal of a criminal action against Petitioner upon grounds that to compel him to stand trial in the court below would be a denial of due process, and, in the alternative, to compel a continuance would deny him his right to a speedy trial. The questions thereby arising are:

1. Whether the action of the

California Supreme Court in affirming the trial court's judgment ordering Petitioner to proceed to trial without a material witness, or, in the alternative, to consent to a continuance, is a violation of the due Process Clause of the Fourteenth Amendment.

2. Whether the action of the California Supreme Court in affirming the trial court's judgment ordering Petitioner to proceed to trial without a material witness, or, in the alternative, to consent to a continuance, is a violation of Petitioner's right to a speedy trial as protected by the Sixth and Fourteenth Amendments.

## Constitutional and Statutory Provisions Involved

"...nor shall any State deprive any person of life, liberty, or property, without due process."

Constitution of the United States, Fourteenth Amendment, Section 1.

* * *

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial..."

Constitution of the United States, Sixth Amendment

* * *

"In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial..."

Constitution of the State of California, Article I, Section 13.

* * *

"The welfare of the people of

the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time, ..."

California Penal Code, Section 1050.

* * *

"In a criminal action the defendant is entitled:
1. To a speedy and public trial.
..."

California Penal Code, Section 686, Subdivision 1.

* * *

"The court, unless good cause to the contrary is shown, must order the action to be dismissed in the following cases:
. . .
2. When a defendant is not brought to trial in a Superior

Court within 60 days after the finding of the indictment or filing of the information..."

California Penal Code, Section 1382, Subdivision 2.

* * *

Statement of Facts

On April 18, 1973, the Grand Jury of Stanislaus County indicted Petitioner under Section 11501 of the California Health and Safety Code for an alleged sale of heroin. Upon arraignment Petitioner entered a plea of not guilty and a trial by jury was set for June 4, 1973. Prior to trial, Petitioner obtained an order for pretrial discovery which provided, among other things, that the District Attorney of Stanislaus County furnish to Petitioner the current

address of one Wayne Morrow. The District Attorney refused to comply with the order. Accordingly, on the morning of trial and upon motion of the Petitioner, the trial court ordered the action dismissed. (Petition, pages 2-3).[2]

Thereafter, the District Attorney recharged the Petitioner with the same alleged offense, this time through the medium of a complaint in the Municipal Court of the Modesto Judicial District. Petitioner again entered a not guilty plea and the matter was set for a preliminary examination to be had on June 29, 1973. In conjunction with the preliminary examination, the Petitioner filed a written Notice of Motion to dismiss the action based upon the facts herein-

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[2] When "Petition" is used the reference is to the Petition for Writ of Prohibition/ Mandate, part of the record before the Superior Court.

after set forth. (Petition, pages 3-4).

One Evans was present in Petitioner's residence at the time of the alleged transaction with which Petitioner was charged. By prearrangement with the Petitioner, Evans was available during the week beginning June 4, 1973, to testify on Petitioner's behalf. At the time of preliminary examination he could not be located. (Petition, pages 3, and 4-5).

In substance, Petitioner asserted that the refusal of the District Attorney to comply with the discovery order in the earlier indictment proceeding had resulted in a delay in going to trial where there was clearly no legitimate reason for delay and had now served to deprive Petitioner of a fair hearing because of the unavailability of Evans, a material witness. The motion was argued at length and denied without prejudice to

renawal at trial time. (Preliminary, pages 61-80).[3]

Petitioner was held to answer on the charge and on July 20, 1973, an information was filed in the Superior Court of Stanislaus County charging the same alleged offense. Upon arraignment the case was set for trial on September 17, 1973. (Petition, page 5).

Thereafter, and on August 31, 1973, Petitioner again filed a Notice of Motion for Dismissal together with Points and Authorities, dealing with both the due process question and the denial of a Speedy trial. See Appendix E, pages 69-89 , infra. The motion was argued on September 7, 1973, September 18, 1973, and October 18, 1973.

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[3] This reference is to the Transcript of the Preliminary Examination in the Municipal Court, part of the record before the Superior Court.

In each instance it was denied although the trial court indicated its willingness to continue the trial of the matter if the Petitioner would so move. See Appendix F, pages 90-92, infra.

On October 24, 1973, Petitioner sought review of the trial court's order refusing to dismiss by means of a Petition for Writ of Prohibition and Mandate filed in the Court of Appeal. That court, on January 30, 1974, unanimously reversed the trial court and ordered a dismissal of the action. See Appendix B, infra, pages 49-66.

The Attorney General then petitioned for a hearing in the California Supreme Court and on July 11, 1974, that Court, by a 4-3 opinion, denied the Writ of Prohibition/Mandate thus upholding the order of the trial court. In substance, the majority held that there was no denial of due process because Petitioner

was negligent in not making certain that the witness, Evans, would be available for trial, he being a "defense" witness. It further held, contrary to the record, that Petitioner had consented to continuances and, therefor, had not been denied a speedy trial. Petitioner had repeatedly objected to continuances (Response, pages 30, 37, 44, 47, 48, 40, 52, 61, 62, 64, 66 and 67).

He now petitions for certiorari.

## Reasons for Granting the Writ

1. The Decision Of The California Supreme Court Is In Direct Conflict With The Due Process Principles Enunciated In This Court's Dickey V. Florida Ruling As Concerns A Fair Trial.

It seems clear to us that Petitioner was entitled to the disclosure of the witness', Morrow's, address pursuant to the discovery order made in the indictment proceeding in the trial court. This proposition is supported by Alford v. United States, 282 U.S. 687, at page 693. cited in our letter of May 12, 1974, to the California Supreme Court. Accordingly, there was no legitimate reason for the District Attorney to refuse disclosure, which, if made, would have allowed Petitioner to proceed to trial on June 4, 1973, with witness, Evans, available. The Opinion[4] cannot be reconciled with Alford nor with the California Court's own Opinion in Eleazer v. Superior Court, 1 Cal 3d 847. In that case the California Court held that there can

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[4] References to the Opinion are to the California Supreme Court Opinion, Appendix A.

be no justification for refusal to disclose an informer's address, even if the motive is to "fasten the security of the informer." Eleazer v. Superior Court, supra, page 852.

It seems equally clear that the absence of the material witness, Evans, is a prejudice which serves to deny Petitioner a fair trial. To put the matter otherwise, where there has been delay without legitimate reason and prejudice results there is a denial of due process. Powell v. United States, 352 F. 2d 705, at page 708; Ross v. United States, 349 F. 2d 210, at page 215; Jackson v. United States, 351 F. 2d 821, at pages 822-823; United States v. Curry, 284 F. Supp. 458, at page 467. See Appendix E, pages 69-89, infra.

Finally, it seems to us that the Opinion simply cannot be reconciled with Dickey v. Florida, 398 U.S. 30. This

Court found in that case that a defendant who was ready to proceed with trial, but failed to do so because of prosecutorial delay, suffered prejudice warranting a summary dismissal by reason of the subsequent death and absence of defense witnesses.

Although Petitioner relied upon Dickey v. Florida in the trial court and at the Supreme Court level, the Opinion fails to mention it.

2. The Decision Of The California Supreme Court Is In Direct Conflict With The Due Process Principles Enunciated In This Court's Dickey v. Florida Ruling As Concerns A Speedy Trial.

In Klopfer v. North Carolina, 386 U.S. 213, this court held that the Sixth Amendment right to a speedy trial is so

basic and fundamental that it applies to the States through the Fourteenth Amendment.

Subsequent holdings of this court have confirmed that a denial of the right of a speedy trial is a denial of Fourteenth Amendment due process. Smith v. Hooey, 393 U.S. 374; United States v. Marion 404 U.S. 307; and Barker v. Wingo, 407 U.S. 514.

Under California law the Petitioner was entitled to be tried within 60 days next following the return of the indictment or the filing of an information in the Superior Court. California Penal Code, Section 1392. Petitioner repeatedly asserted that right. His only waiver was for the purpose of petitioning the Court of Appeal for a Writ of Prohibition/Mandate after the trial court had denied his application for dismissal.

In any event, whether we relate to the Sixth Amendment, the Fourteenth Amendment, Article I, Section 13, of the California Constitution, or Section 1392, we believe the factual situation herewith presented is literally encompassed by the language of Chief Justice Burger in Dickey v. Florida, supra, page 38:

> "...no valid reason for the delay existed; it was exclusively for the convenience of the State. On this record the delay with its consequent prejudice is intolerable as a matter of fact and impermissable as a matter of law."

Finally, although the length of the delay here (6 months from indictment to denial of motion to dismiss) may be relatively short as compared with Klopfer (indefinite), Hooey (7 years), Dickey

(8 years), Marion (3 years), and Wingo (5 years), the other 3 tests established by Barker v. Wingo, namely, reason for delay, Petitioner's assertion of his right, and prejudice, must be resolved in Petitioner's favor. The delay resulted from the conduct of the prosecution, Petitioner has repeatedly asserted his right to a speedy trial, and the end result has been to deprive Petitioner of a material witness and, thus, a fair trial.

Conclusions

Petitioner is entitled to a fair, impartial, and speedy trial. This means a trial in which all material facts are presented fairly and one in which defendant's constitutional guarantees are neither qualified nor infringed. It means a trial in which Petitioner shall

have the right to prepare, and to present, his defense. This also means that such rights are to be accorded at the time the case is scheduled to go to trial, not at some later date, convenient only to the prosecution.

For the foregoing reasons, we believe that a Writ of Certiorari should issue to review the Judgment and Opinion of the California Supreme Court.

Respectfully submitted,

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# APPENDIX A

SUPREME COURT
FILED
G. E. BISHEL, Clerk
JUL 11 1974

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN BANK

JOSEPH BELLIZZI,

Petitioner,

v.

THE SUPERIOR COURT OF THE COUNTY OF STANISLAUS,

Respondent;

THE PEOPLE,

Real Party in Interest.

S.F. 23107

Sup. Ct. No. 122338

The People's failure to comply with a pretrial discovery order led to the dismissal of drug charges against petitioner. Two days later, a new complaint was lodged against petitioner containing the same charges. In the interim, however, a witness assertedly favorable to petitioner evidently left the state upon learning of the dismissal

SEE DISSENTING OPINION

and has not been located since. The question arises whether, under these circumstances, petitioner's inability to call this witness in his defense / at his 1/ forthcoming trial constitutes a denial of his right to due process of law. A subsidiary question is whether the People's decision to refile the charges rather than appeal the dismissal order has deprived petitioner of his right to a speedy trial.

We have concluded that the unavailability of petitioner's witness was not attributable to any impropriety on the People's part and that the prosecution acted with reasonable dispatch in attempting to bring petitioner to trial. Accordingly, the instant petition to restrain further proceedings in this case should be denied.

The charge brought against petitioner (Health & Saf. Code, § 11501)

is based upon an alleged sale of heroin to David Morrow, a paid police informant. Petitioner was indicted for the offense and a jury trial scheduled for June 4, 1973. Petitioner moved for discovery of the names and addresses of all prospective prosecution witnesses and the court so ordered. Although the People disclosed informant Morrow's name and made him available to petitioner's counsel for pretrial examination, Morrow's address was not revealed (evidently because the People feared for his safety). Accordingly, [1] the trial court granted petitioner's motion to dismiss the action in the interest of justice (Pen. Code, § 1385). Instead of taking an appeal from the dismissal (Pen. Code, § 1238, subd. (a), subsec. (8) ), the prosecution exercised its statutory right (see Pen. Code, § § 1387, 1382, subd. (2) ), and filed a new complaint containing the same

[1] 2/

charge set forth in the indictment. The new complaint was filed on June 6, two days following the entry of the trial court's dismissal order.

At the preliminary hearing which followed, informant Morrow testified that he had purchased heroin from petitioner at petitioner's home on the evening of January 31, 1973. Morrow further testified that a third person, Hal Evans, had been present at petitioner's home that evening but had temporarily left the house during the actual purchase of heroin from petitioner. It now appears that Evans, having learned of the June 4 dismissal of charges against petitioner, left town and can not be located. It is the alleged present unavailability of Evans as a defense witness which gives rise to petitioner's contention that he cannot obtain due process in the forthcoming trial. [3]

1. Due Process of Law.

Generally, an accused is not entitled to a dismissal simply because he is unable to produce witnesses assertedly necessary to his defense. (People v. Kirkpatrick, 7 Cal.3d 480, 486.) The rule is otherwise, however, where it is shown that the prosecution has wrongfully deprived an accused of the opportunity to secure the presence of a material witness. This was made clear in People v. Kiihoa, 53 Cal.2d 748, in which we held that it was a denial of due process for the People to defer prosecution of the defendant until a police informant who was a material witness had left the jurisdiction.

Petitioner contends that under the rationale of People v. Kiihoa, supra, 53 Cal.2d 748, the filing of a new complaint in the instant case constituted a similar denial of due process. We disagree. The fundamental due process principle

underlying Kiihoa is that the prosecution may not deprive an accused of the opportunity to present material evidence which might prove his innocence. Even if the prosecution's motives are "praiseworthy," they can not prevail when they "inevitably result, intentionally or unintentionally, in depriving the defendant of a fair trial." (Italics added; id. at p. 754.) Significantly Kiihoa involved the unavailability of a police informant.[1] As / 4/ such, the witness was in contact with, and under the control of, the prosecution. Realistically only the prosecution could have assured the witness' presence at trial and thus fairness required that the

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1/ The instant case also involves a police informant, Morrow, and, as stated above, the nondisclosure of the latter's address led to dismissal of the original indictment. Petitioner does not here contend, however, that Morrow will be unavailable as a witness in the forthcoming

(Fn. 1 continued)

People, rather than the defendant, bear the responsibility for maintaining that witness' availability.[2/] (See Eleazer v. Superior Court, 1 Cal.3d 847.)

In contrast, in the instant case, witness Evans was a friend of petitioner and had agreed to / testify 5/ in his defense. When the charges against

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(Fn. 1 continued)

trial or that the People's refusal to furnish Morrow's address itself violated due process.

2/ Similarly, Harris v. Superior Court, 35 Cal.App.3d 24, also relied upon by petitioner, is not controlling. In that case defendant's conviction was reversed on the ground that the trial court had erred in refusing to compel disclosure of the identity of a police informant who was a material witness. By the time the proceedings were reinitiated the informant had disappeared. The court held that further prosection would constitute a denial of due process, reasoning that "the original refusal of the People to disclose the name of the informant coupled with circumstances beyond control of petitioner has deprived petitioner of information already determined essential to her having a fair trial."

(Fn 2 continued)

petitioner were ordered dismissed, petitioner or his counsel should have realized that the prosecution could either appeal that order[3/] or refile the charge in a new action.[4/] Inasmuch as it was

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(Fn. 2. continued)

(Italics added; id., at p. 27.) Harris, like People v. Kiihoa, supra, 53 Cal.2d 748, deals only with the situation in which a police informant who is a material witness becomes unavailable. The common sense rationale of Kiihoa and Harris, that the People must bear the responsibility of producing their own agents and informants, is inapplicable where, as in the instant case, the defendant has ample opportunity to assure his witness' presence at trial.

3/ The order of dismissal was an appealable order (Pen. Code, § 1238, subd. (8) ), and the People would have had 60 days within which to file the notice of appeal (rule 2, subd. (a), and rule 31, subd. (a), Cal. Rules of Court).

4/ An order for the dismissal of a felony action made before jeopardy has attached is not a bar to further prosecution (Pen. Code, § 1387), and upon refiling the 60-day time period within which to bring defendant to trial (Pen. Code, § 1382, subd. (2) ), starts anew (People v. Faulkner, 28 Cal.App.3d 384, 395).

petitioner who informed witness Evans of the dismissal, he had ample opportunity to ascertain Evans' future plans so that he could reach him in the event a trial ultimately were held. Since Evans' unavailability as a defense witness cannot be said to be the "inevitable" result of the People's action or omission, it would be unreasonable to hold the People accountable therefor.

2. Right to Speedy Trial

Petitioner also contends that the People's decision to refile the charge rather than appeal the dismissal order has deprived him of his right to a speedy trial. His contention, however, is without merit. /6/

It is well established that the 60-day statutory period within which defendant must be brought to trial (Pen. Code, § 1382, subd. (2) ), begins anew with the filing of the new indictment.

(People v. Godlewski, 22 Cal.2d 677, 683; People v. Faulkner, supra, 28 Cal. App.3d 384, 395.) In the instant case the People refiled charges against petitioner two days after dismissal of the original proceedings and rearrested him six days later. All delays beyond the applicable 60-day period have been requested by or granted with the consent of petitioner. The People have thus clearly complied with the statutory requirements.

Nevertheless, the prosecution's statutory right to refile cannot infringe upon petitioner's constitutional right to a speedy trial. To hold, however, that petitioner had been denied a speedy trial as a result of prosecutorial delay in this case would require us to find that the prejudicial effect of the delay outweighed any justification for it. (Jones v. Superior Court, 3 Cal.3d 734,

740; see Sykes v. Superior Court, 9 Cal. 3d 83.)[5/] Of / course, in performing 7/ this balancing test, we consider and weigh only that "prejudice" for which petitioner was not responsible. As noted above, petitioner in the instant case was in contact with his friend, witness Evans, and yet failed to take steps to assure that Evans would remain available to testify. If petitioner's negligence is a significant factor in causing the alleged prejudice, he should not be

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5/ Our conclusion remains the same if we employ the "ad hoc balancing test" of Barker v. Wingo, 407 U.S. 514, 530, which requires consideration of such factors as the length of the delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant in appraising a claimed denial of his right to a speedy trial under the Sixth Amendment to the United States Constitution. Here, as noted above, the delay was minimal and, in any event, whatever prejudice defendant may have suffered was primarily attributable to his own neglect.

entitled to assert such prejudice as a ground for speedy trial relief.

The petition for a writ of prohibition is denied.

BURKE, J.

WE CONCUR:

WRIGHT, C. J.

McCOMB, J.

CLARK, J. 8/

BELLIZZI v. SUPERIOR COURT

S.F. 23107

DISSENTING OPINION BY MOSK, J.

I dissent.

Whether deliberately or inadvertently, the obdurate refusal of the prosecutor to comply with a valid court order was directly responsible for the denial of a speedy trial to this defendant. The seven-month delay has been demonstrably prejudicial and will likely prevent a fair trial. It follows that defendant is entitled to the relief he seeks.

The issue was properly analyzed in the Court of Appeal opinion written by Justice Franson and concurred in by Presiding Justice G. A. Brown and Assigned Justice Thompson. I adopt their

opinion as my dissent:* 1/

On April 18, 1973, the Grand Jury of Stanislaus County indicted petitioner, charging him with a sale of heroin on January 31, 1973, in violation of Health and Safety Code section 11501 (now § 11352). Petitioner entered a plea of not guilty and a jury trial was scheduled for June 4, 1973.

On May 31, 1973, petitioner moved for discovery of the names and current addresses of all prospective witnesses who would be called to testify

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*Brackets together, in this manner [ ] without enclosing material, are used to indicate deletions from the opinion of the Court of Appeal; brackets enclosing material (other than editor's added parallel citations) are, unless otherwise indicated, used to denote insertions or additions. (See Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 311, fn. 2, and cases cited.)

by the prosecution at the trial. On June 1, the court ordered the prosecution to furnish the petitioner with "the names and current addresses of all persons who will be called to testify at the trial of the within action, particularly including the current address of [David] Morrow." The prosecution refused to comply with the order, and on June 4, 1973, prior to the commencement of trial, the action was dismissed.

Thereafter, on June 6, 1973, the People filed a complaint against petitioner containing the same charges as in the indictment.[1/] On June 29, and July 16, a preliminary [2/] hearing was

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1/ Inasmuch as the order of dismissal was an appealable order (Pen. Code, § 1238, subd. (8) ) we presume that when the People elected to refile the charges against petitioner rather than seek appellate review of the order of dismissal they recognized the propriety of the order requiring the production of the address of Morrow and intended to

(Fn. 1 continued)

held and at the conclusion thereof, petitioner moved to dismiss the action because he was unable to produce Hal Evans who he contended was a material witness to the charge pending against him. Petitioner asserted that his inability to produce this witness was caused by the delay in prosecution which had resulted from the district attorney's refusal to furnish Morrow's address when petitioner was first charged with the offense. The motion was denied and petitioner was held to answer to the superior court.

On July 20, 1973, an information was filed against petitioner; he again was arraigned, entered a plea of not

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(Fn. 1 continued)

furnish the address to avoid another dismissal. The duty to disclose information as to the whereabouts of a material witness is clear. (Smith v. Illinois, 390 U.S. 129, 131-133 [19 L.Ed.2d 956, 958-960, 88 S.Ct. 748, 750]; Eleazer v. Superior Court, 1 Cal.3d 847, 853 [83 Cal.

(Fn. 1 continued)

guilty and the case was set for trial on September 17, 1973.

On August 31, 1973, petitioner moved to dismiss the action upon the grounds that he had been denied due process of law and the right to a speedy trial as a result of the unjustified delay in prosecution which resulted in his being deprived of a material witness.

On September 7, petitioner's motion to dismiss came on for hearing. The district attorney produced Marian Evans, mother of Hal Evans, who testified that her son's current address was 355 Columbia Street, Bend, Oregon. The respondent court issued a certificate to the

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(Fn. 1 continued)

Rptr. 586, 464 P.2d 42]; People v. Mascarenas, 21 Cal. App.3d 660, 666-668 [98 Cal.Rptr. 728]; People v. Helmholtz, 10 Cal.App.3d 441, 446 [88 Cal.Rptr. 743]; see also Evid. Code, § 1041, 1042.)

Circuit Court of the State of Oregon for Deschutes County specifying that Evans was a / material witness and asking that 3/ he be required to attend the proceedings in the instant action.

On September 18, 1973, defense counsel and the district attorney indicated that witness Evans could not be found at the Oregon address and that his whereabouts was unknown. Petitioner's motion to dismiss was denied and the case was continued for trial to October 23, 1973, and thereafter continued again to November 7. On October 24, the instant petition for extraordinary relief was filed with this court, and on November 16 we issued an order to show cause as to why the action should not be dismissed. [ ]

Petitioner's declaration in support of his motion to dismiss states that he had known Hal Evans personally for approximately 11 years and saw him

frequently between December 1, 1972, and June 4, 1973. The last time he saw Evans was on the morning of June 4 at about 11 a.m. at the residence of Joel Zamora, which is one of the places Evans told him that he could be reached whenever petitioner wanted him for the purpose of testifying at his trial. Evans had promised him that he would be available to testify at the / trial scheduled for 4/ June 4. When petitioner saw Evans on the morning of June 4, he told Evans that the charges had been dismissed.

Petitioner's declaration further states that Evans was present at petitioner's residence at the time of the alleged sale; that he is informed and believes that Evans would testify that no sale of any narcotic substance was made by petitioner at the time to anyone; that Evans was present in petitioner's residence during all of the time that David Morrow was

there with the exception of approximately 30 seconds to one minute when he stepped onto the front porch and then returned to the livingroom.

Petitioner states that since he was rearrested on June 12, 1973, because of the refiling of the charges against him, he has made extended efforts to locate Evans and has contacted numerous friends of Evans to see if he could ascertain his whereabouts but to no avail. [ ]

Petitioner contends that to force him to trial without the benefit of Evans' testimony would be a denial of his right to a fair trial. We conclude that petitioner's contention has merit.

Normally, an accused is not entitled to a dismissal simply because he is unable to produce witnesses necessary to his defense. He, of course, is entitled to a / reasonable continuance 5/

to locate the witness but if he is not successful he nevertheless must stand trial. (People v. Kirkpatrick, 7 Cal.3d 480, 486 [102 Cal.Rptr. 744, 498 P.2d 992].)

However, the rule is otherwise where it is shown that the defendant has been deprived of the testimony of a material witness because of improper conduct on the part of the prosecution. In Harris v. Superior Court, 35 Cal.App. 3d 24 [110 Cal.Rptr. 400], the defendant was convicted of possession of heroin. On appeal the judgment was reversed on the ground that the trial court erred in refusing to compel disclosure of the name of an informer who was determined to be a material witness. Thereafter, criminal proceedings were resumed against the defendant and the prosecution disclosed the name of the informant. By this time, however, the informant had disappeared and

he could not be located. In ordering the action dismissed, the reviewing court held that the People's improper refusal to disclose the identity of the informant at the first trial, coupled with his later disappearance, would, on retrial, deprive the defendant of a fair trial. The court held that if any party must suffer the consequences of the prosecution's original decision to refuse disclosure of the identity of the informer it must be the People and not the accused. / 6/

In People v. Kithoa, 53 Cal. 2d 743 [3 Cal.Rptr. 1, 349 P.2d 673], the prosecution in a narcotics case chose to release the defendant after arrest rather than disclose the identity of the informant who was a material witness and deferred prosecuting the defendant for some five months until the informant had left the state, thereby rendering himself immune from process. In reversing the

conviction, the Supreme Court held that a denial of a fair trial and due process would exist "where the prosecution is allowed to control the course of the proceedings in a manner which would prevent the accused from presenting material evidence." It was noted that it is the duty of the district attorney not to obtain convictions but to fully and fairly present to the court the evidence material to the charge upon which the defendant stands trial, and it is the duty of the trial judge to see that facts material to the charge are fairly presented so that the constitutional guaranties of the defendant are not violated.

By clear analogy the due process standard enunciated in Harris and Kiihoa is applicable to the case at bench. To force petitioner to trial without the testimony of Evans in the face of the prosecution's improper refusal to comply

with the discovery order which resulted in a dismissal of the action on June 4 would be to deny petitioner his right to a fair trial. 7/

Viewing the problem from the perspective of petitioner's right to a speedy trial, as guaranteed by the Sixth Amendment and article I, section 13, of the California Constitution, we observe that petitioner originally was scheduled for trial on June 4 when Evans was available as a witness. However, because the prosecution refused to comply with the discovery order, the trial was delayed until November, almost seven months after the original indictment. 2/

---

2/ Generally, an order for the dismissal of a felony action made before jeopardy has attached is not a bar to further prosecution (Pen. Code, § 1387). Upon refiling, the 60-day time period within which to bring a defendant to trial (Pen. Code, § 1382) starts anew (People

(Fn. 2 continued)

The test for determining whether a defendant has been denied the right to a speedy trial by reason of prosecutorial delay is to weigh the prejudice to the defendant against the justification shown for the delay. (Jones v. Superior Court, 3 Cal.3d 734, 741, fn. 1 [91 Cal.Rptr. 578, 478 P.2d 10]; People v. Archerd, 3 Cal.3d 615, at pp. 639-640 [91 Cal.Rptr. 397, 477 P.2d 421]; Penney v. Superior Court, 28 Cal.App.3d 941, 951-952 [105

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(Fn. 2 continued)

Faulkner, 28 Cal.App.3d 384, 395 [104 Cal.Rptr. 625]). However, the prosecution's statutory right to refile cannot overcome the state and federal constitutional guaranties of a speedy trial, and where an accused has shown actual prejudice from the delay, he is entitled to a dismissal. (See People v. Williams, 71 Cal.2d 614, 623 [79 Cal.Rptr. 65, 456 P.2d 633]; People v. Wilson, 60 Cal.2d 139, 150-151 [32 Cal.Rptr. 44, 383 P.2d 452]; cf. Harris v. Superior Court, supra, 35 Cal.App.3d 24, 27.)

Cal.Rptr. 162]; People v. Vanderburg, 32 Cal.App.3d 526, 531 [108 Cal.Rptr. 104].)/ 8/

Petitioner has clearly shown prejudice. It is undisputed that Evans is a material witness. He was present in petitioner's house at or about the time the alleged sale took place and according to the allegations of petitioner's affidavit his testimony would have substantial probative value on the question of petitioner's guilt or innocence. Petitioner's showing that Evans was available to testify at the original trial date but, thereafter, became unavailable, also is unchallenged.

Real party in interest is unable to justify the delay other than by arguing that there has been no deliberate suppression of evidence on their part nor has there been any showing that they knew or suspected that Evans would become unavailable as a witness. However, intentional suppression

of evidence of bad faith on the part of the prosecution is not an essential element of a defendant's right to a fair or speedy trial. (People v. Kiihoa, supra, 53 Cal.2d at p. 753; Penney v. Superior Court, supra, 28 Cal.App.3d at p. 953.) As stated in Kiihoa: "It is next contended that because there was no procurement of or active participation by the law enforcement agency in [the informant's] removal from the jurisdiction there was no state action which deprived the defendant of due process of law. The record does indicate that the police did not arrange for [the informant's] absence. / The 9/ critical question, however, is not necessarily one of improper conduct in bringing about [the informant's] absence, but rather, whether the defendant's conviction resulted from some form of trial in which his essential rights were disregarded or denied. We are persuaded

that the circumstances surrounding this prosecution affected and mitigated against the defendant's right to a fair and impartial trial." (53 Cal.2d at p. 753.)

Similarly, in Penney v. Superior Court, supra, 28 Cal.App.3d 941, at p. 953, we said: "The requirement of a legitimate reason for the prosecutorial delay cannot be met simply by showing an absence of deliberate, purposeful or oppressive police conduct. A 'legitimate reason' logically requires something more than the absence of governmental bad faith."

Under the circumstances we see no alternative but to grant petitioner the relief prayed for. [ ]

MOSK, J.

WE CONCUR:

TOBRINER, J.
SULLIVAN, J.

10/

# APPENDIX B

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

| | |
|---|---|
| JOSEPH BELLIZZI,<br><br>Petitioner,<br><br>v.<br><br>THE SUPERIOR COURT OF STANISLAUS COUNTY,<br><br>Respondent.<br><br>THE PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Real Party in Interest. | 5 Civ. No. 2141<br>(Sup. Ct. No. 122338<br><br>O P I N I O N<br><br>FILED<br>JAN 30 1974<br>DAVID BLOMGREN, Clerk |

Petition for a writ of prohibition and/or mandate to restrain respondent court from further proceeding in the criminal action now pending against petitioner. Writ of prohibition granted.

ROBERT R. ELLEDGE for Petitioner.

EVELLE J. YOUNGER, Attorney General, EDWARD A. HINZ, JR., Chief

Assistant Attorney General, DORIS H. MAIER, Assistant Attorney General, and ROGER E. VENTURI, Deputy Attorney General, for Real Party in Interest.

No appearance for Respondent.

CHRONOLOGY

On April 18, 1973, the grand jury of Stanislaus County indicted petitioner, charging him with a sale of heroin on January 31, 1973, 1/ in violation of Health and Safety Code section 11501. Petitioner entered a plea of not guilty and a jury trial was scheduled for June 4, 1973.

On May 31, 1973, petitioner moved for discovery of the names and current addresses of all prospective witnesses who would be called to testify by the prosecution to furnish the petitioner with "the names and current addresses of all persons who will be called to testify at the trial of the within action, particularly including the current address of

unable to produce Hal Evans who he contended was a material witness to the charge pending against him. Petitioner asserted that his inability to produce this witness was caused by the delay in prosecution which had resulted from the district attorney's refusal to furnish Morrow's address when petitioner was first charged with the offense. The motion was denied and petitioner was held to answer to the superior court. 2/

On July 20, 1973 an information was filed against petitioner; he again was arraigned, entered a plea of not guilty and the case was set for trial on September 17, 1973.

On August 31, 1973, petitioner moved to dismiss the action upon the grounds that he had been denied due process of law and the right to a speedy trial as a result of the unjustified delay in prosecution which resulted in

his being deprived of a material witness.

On September 7, petitioner's motion to dismiss came on for hearing. The district attorney produced Marian Evans, mother of Hal Evans, who testified that her son's current address was 355 Columbia Street, Bend, Oregon. The respondent court issued a certificate to the Circuit Court of the State of Oregon for Deschutes County specifying that Evans was a material witness and asking that he be required to attend the proceedings in the instant action.

On September 18, 1973, defense counsel and the district attorney indicated that witness Evans could not be found at the Oregon address and that his whereabouts was unknown. Petitioner's motion to dismiss was denied and the case was continued for trial to October 23, 1973, and thereafter continued again to November 7. On October 24, the instant petition

for extraordinary relief was filed with this court, and on November 16 we issued an order to show cause as to why the action should not be dismissed. / 3/

FACTS

At the preliminary hearing, David Morrow testified as follows: On January 31, 1973, about 7 p.m. he made arrangements with officers of the Modesto Police Department to attempt a "buy" from petitioner. Morrow and his car were searched by the police and he was given $50 with which to purchase heroin. Thereafter, he drove to petitioner's residence at 136 James Street in Modesto. The officers followed him in a separate car and waited outside.

Morrow knocked on petitioner's door; petitioner answered the door and invited him in. Morrow stated that petitioner and Hal Evans were having a conversation and "after their conversation

I asked [petitioner] if he had any spoons for sale and he said that he had." Morrow testified that Evans was at the residence for only a short period of time and that after Evans' conversation with the petitioner Evans left. Morrow stated that after Evans left he followed petitioner into the bedroom where he observed an amount of heroin on a nightstand. He stated that petitioner cut a portion of the heroin into a balloon and sold it to him for $40. Just before leaving the residence, Evans came back into the front room and made a few remarks about a car that was outside.

After leaving the residence Morrow turned over the heroin and $10 in change to the officers. He also advised the officers that Evans had been at petitioner's residence.

On cross-examination, Morrow acknowledged that Evans had been present

at other times when he made buys for the police department and that he had seen Evans make sales to other persons. He also stated, "when I was in the Bellizzi residence, that Mr. Bellizzi and / 4/ Mr. Evans were discussing a sale, but I did not actually see them transact money."

Petitioner's declaration in support of his motion to dismiss states that he had known Hal Evans personally for approximately 11 years and saw him frequently between December 1, 1972 and June 4, 1973. The last time he saw Evans was on the morning of June 4 at about 11 a.m. at the residence of Joel Zamora, which is one of the places Evans told him that he could be reached whenever petitioner wanted him for the purpose of testifying at his trial. Evans had promised him that he would be available to testify at the trial scheduled for June 4. When petitioner saw Evans on the

morning of June 4, he told Evans that the charges had been dismissed.

Petitioner's declaration further states that Evans was present at petitioner's residence at the time of the alleged sale; that he is informed and believes that Evans would testify that no sale of any narcotic substance was made by petitioner at the time to anyone; that Evans was present in petitioner's residence during all of the time that David Morrow was there with the exception of approximately 30 seconds to one minute when he stepped onto the front porch and then returned to the livingroom.

Petitioner states that since he was rearrested on June 12, 1973 because of the refiling of the charges against him, he has made extended efforts to locate Evans and has contacted numerous friends of Evans to see if he could ascertain his whereabouts but to no avail.

morning of June 4, he told Evans that the charges had been dismissed.

Petitioner's declaration further states that Evans was present at petitioner's residence at the time of the alleged sale; that he is informed and believes that Evans would testify that no sale of any narcotic substance was made by petitioner at the time to anyone; that Evans was present in petitioner's residence during all of the time that David Morrow was there with the exception of approximately 30 seconds to one minute when he stepped onto the front porch and then returned to the livingroom.

Petitioner states that since he was rearrested on June 12, 1973 because of the refiling of the charges against him, he has made extended efforts to locate Evans and has contacted numerous friends of Evans to see if he could ascertain his whereabouts but to no avail.

The declaration of Joel Zamora states that he has known Evans for approximately 10 years and would usually see him on an average of once a week up until June 4, 1973. He states that he saw Evans / around 11 a.m. on the morning 5/ of June 4, at his residence, when petitioner came to the house to tell him that the charges against petitioner had just been dismissed. Zamora's declaration states that he last saw Hal Evans on either Wednesday or Thursday of that week, June 6 or June 7, when Evans came to his house but that he has not seen him since that time and has been unable to find out where he is although he has made inquiries to other people as to his whereabouts.

DISCUSSION

Petitioner contends that to force him to trial without the benefit of Evans' testimony would be a denial of his

right to a fair trial. We conclude that petitioner's contention has merit.

Normally, an accused is not entitled to a dismissal simply because he is unable to produce witnesses necessary to his defense. He, of course, is entitled to a reasonable continuance to locate the witness but if he is not successful he nevertheless must stand trial. (People v. Kirkpatrick, 7 Cal.3d 480, 486.)

However, the rule is otherwise where it is shown that the defendant has been deprived of the testimony of a material witness because of improper conduct on the part of the prosecution. In Harris v. Superior Court, 35 Cal.App. 3d 24, the defendant was convicted of possession of heroin. On appeal the judgment was reversed on the ground that the trial court erred in refusing to compel disclosure of the name of an informer who was determined to be a material

witness. Thereafter, criminal proceedings were resumed against the defendant and the prosecution disclosed the name of the informant. By this time, however, the informant had disappeared and he could not be located. In ordering the action dismissed, the reviewing court held / 6/ that the People's improper refusal to disclose the identity of the informant at the first trial, coupled with his later disappearance, would, in retrial, deprive the defendant of a fair trial. The court held that if any party must suffer the consequences of the prosecution's original decision to refuse disclosure of the identity of the informer, it must be the People and not the accused.

In Kiihoa v. Superior Court, 53 Cal.2d 748, the prosecution in a narcotics case chose to release the defendant after arrest rather than disclose the identity of the informant who

witness. Thereafter, criminal prceedings were resumed against the defendant and the prosecution disclosed the name of the informant. By this time, however, the informant had disappeared and he could not be located. In ordering the action dismissed, the reviewing court held / 6/ that the People's improper refusal to disclose the identity of the informant at the first trial, coupled with his later disappearance, would, in retrial, deprive the defendant of a fair trial. The court held that if any party must suffer the consequences of the prosecution's original decision to refuse disclosure of the identity of the informer, it must be the People and not the accused.

In Kiihoa v. Superior Court, 53 Cal.2d 748, the prosecution in a narcotics case chose to release the defendant after arrest rather than disclose the identity of the informant who

was a material witness and deferred prosecuting the defendant for some five months until the informant had left the state, thereby rendering himself immune from process. In reversing the conviction, the Supreme Court held that a denial of a fair trial and due process would exist "where the prosecution is allowed to control the course of the proceedings in a manner which would prevent the accused from presenting material evidence." It was noted that it is the duty of the district attorney not to obtain convictions but to fully and fairly present to the court the evidence material to the charge upon which the defendant stands trial, and it is the duty of the trial judge to see that facts material to the charge are fairly presented so that the constitutional guaranties of the defendant are not violated.

By clear analogy the due process

standard enunciated in Harris and Kiihoa is applicable to the case at bench. To force petitioner to trial without the testimony of Evans in the face of the prosecution's improper refusal to comply with the discovery order which resulted in a dismissal of the action on June 4 would be to deny petitioner his right to a fair trial. /7/

Viewing the problem from the perspective of petitioner's right to a speedy trial, as guaranteed by the Sixth Amendment and article I, section 13 of the California Constitution, we observe that petitioner originally was scheduled for trial on June 4 when Evans was available as a witness. However, because the prosecution refused to comply with the discovery order, the trial was delayed until November, almost seven months after

Superior Court, 28 Cal.App.3d 941, 951-952; People v. Vanderburg, 32 Cal.App.3d 526, 531.)

Petitioner has clearly shown prejudice. It is undisputed that Evans is a material witness. He was present in petitioner's house at or about the time the alleged sale took place and according to the allegations of petitioner's affidavit his testimony would have substantial probative value on the question of petitioner's guilt or innocence. Petitioner's showing that Evans was available to testify at the original trial date but, thereafter, became unavailable, also is unchallenged. /8/

Real party in interest is unable to justify the delay other than by arguing that there has been no deliberate suppression of evidence on their part nor has there been any showing that they knew or suspected that Evans would become

unavailable as a witness. However, intentional suppression of evidence or bad faith on the part of the prosecution is not an essential element of a defendant's right to a fair or speedy trial. (People v. Kiihoa, supra, 53 Cal.2d at 753; Penney v. Superior Court, supra, 28 Cal. App.3d at 953.) As stated in Kiihoa:

> "It is next contended that because there was no procurement of or active participation by the law enforcement agency in [the informant's] removal from the jurisdiction there was no state action which deprived the defendant of due process of law. The record does indicate that the police did not arrange for [the informant's] absence. The critical question, however, is not necessarily one of improper conduct in bringing about [the informant's] absence, but rather, whether the defendant's conviction resulted from some form of trial in which his essential rights were disregarded or denied. We are persuaded that the circumstances surrounding this prosecution affected and mitigated against the defendant's right to a fair and impartial trial." (53 Cal.2d at 753.)

Similarly, in Penney v. Superior

Court, supra, 25 Cal.App.3d 941 at 953, we said:

> "The requirement of a legitimate reason for the prosecutorial delay cannot be met simply by showing an absence of deliberate, purposeful or oppressive police conduct. A 'legitimate reason' logically requires something more than the absence of governmental bad faith."

Under the circumstances we see no alternative but to grant petitioner the relief prayed for. / 9/

Let a peremptory writ of prohibition issue restraining respondent court from further proceeding with this action other than to order a dismissal of the action.

Franson
J..

WE CONCUR:

Brown (Geo A)
P.J.

Thompson
J. 10/

# APPENDIX C

S.F. No. 23107

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
AUG 2 1974
G. E. BISHEL, Clerk

BELLIZZI

v.

THE SUPERIOR COURT - COUNTY OF STANISLAUS

The time for granting or denying a rehearing in the above cause is hereby extended to and including September 6, 1974.

Wright
Chief Justice

# APPENDIX D

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

AUG 28 1974

I have this day filed Order _____

REHEARING DENIED

In re: S.F. No. 23107

Bellizzi

vs.

Superior Court, Stanislaus

Respectfully,

G. E. BISHEL
Clerk

# APPENDIX E

Law Offices of
ROBERT R. ELLEDGE
1301 K Street, Suite E
Post Office Box 852
Modesto, California 95353
Telephone (209) 522-1007

FILED
1973 AUG 31 PM 3 03
STEVE R. NELSON,
CLERK

Attorneys for Defendant

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF STANISLAUS

| | |
|---|---|
| THE PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff,<br><br>vs.<br><br>JOSEPH BELLIZZI,<br><br>Defendant. | NO. 122338<br><br>NOTICE OF MOTION FOR DISMISSAL |

TO THE PEOPLE OF THE STATE OF CALIFORNIA AND TO DONALD N. STAHL, DISTRICT ATTORNEY OF THE COUNTY OF STANISLAUS, STATE OF CALIFORNIA:

NOTICE IS HEREBY GIVEN that on the 7th day of September, 1973, at the hour of 9:00 o'clock a.m. of said day, or as soon thereafter as the matter can be

heard, at the Courtroom of Department No. 2 of the above-entitled Court, at the Courthouse, in the City of Modesto, County of Stanislaus, State of California, the defendant will move the above-entitled Court for an order dismissing the within action upon grounds that the defendant has / been denied due process of law by 1/ reason of unnecessary delay resulting in prejudice to him and upon grounds that he has been denied the right to a speedy trial resulting in prejudice to him.

THIS MOTION is based upon this notice and the points and authorities in support of motion to dismiss on file herein, the supporting declarations of ROBERT R. ELLEDGE, JOSEPH BELLIZZI, and JOEL ZAMORA, together with such oral and documentary evidence as may be presented at the time of hearing this motion, upon all the pleadings, papers and records,

including the testimony taken at the preliminary examination herein, and upon the content of that certain file entitled The People of the State of California vs. Joseph Bellizzi, Stanislaus County Superior Court action No. 21113 of which the Court is requested to take judicial notice pursuant to the provisions of Section 452, Subdivision (d), of the Evidence Code of the State of California.

DATED this 31st day of August, 1973.

LAW OFFICES OF ROBERT R. ELLEDGE

By /s/ ROBERT R. ELLEDGE
ROBERT R. ELLEDGE 2/

Law Offices of
ROBERT R. ELLEDGE
1301 K Street, Suite E
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FILED
1973 AUG 31 pm 3 03
STEVE R. NELSON,
CLERK

Attorneys for Defendant

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF STANISLAUS

| | |
|---|---|
| THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, | NO. 122338 |
| vs. | POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS |
| JOSEPH BELLIZZI, Defendant. | |

1. Excessive and Unexcused Delay is Ground For Dismissal Of A Criminal Charge.

"In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial."

Sixth Amendment to United States Constitution.

* * *

"In criminal prosecutions, in any court / whatever, the party accused shall have the right to a speedy and public trial." 1/

Article I, Section 13, Clause 1 of the California Constitution.

* * *

"The welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time, and it shall be the duty of all courts and judicial officers and of all prosecuting attorneys to expedite such proceedings to the greatest degree that is consistent with the ends of justice."

Section 1050, Penal Code.

* * *

"Excessive, unexcused delay in a ground for dismissal of a criminal charge even though the particular delay is not specifically covered by a statute requiring mandatory dismissal. Article I, section 13, of the California Constitution states the fundamental policy that the defendant shall have the right to a speedy trial. The provisions of Article I, section 13, although lacking an express time limit, are self-executing and thus give the defendant a right to move for a dismissal for excessive delay even though the delay does not come within any of the mandatory dismissal statutes. (Cf. People v. Godlewski (1943) 22 Cal. 2d 677, 682 [140 P. 2d 381]; Witkin, Cal. Criminal Procedure (1963) # 306, p. 300. See also Pen. Code, # 1050.) 1/ 2/

"We do not question the right of the People to dismiss a felony charge and to refile it at any time before limitations have run. (Pen. Code, #1387; People v. Godlewski, supra, 22 Cal. 2d at p. 681.) The People, however, cannot avoid dismissal for unwarranted delay simply by successive dismissals and unexcused refilings of the same charges, unconscionably extending the pendency of the criminal charges without trial."

People v. Flores, 202 Cal. App. (2d) 315, at page 321.

* * *

2. There Is No Presumption That Good Cause For Delay In Trial Exists.

"' [W]hat is a speedy trial in the constitutional sense ...depends on the circumstances of each case bearing on... good cause' for the delay in bringing a defendant to trial. (In re Lopez (1952) 39 Cal. 2d 113, 120 [245 P. 2d 1]; see also Pollard v. United States (1957) 352 U.S. 354, 361 [77 S. Ct. 481, 1 L. Ed. 2d 393].) When there has been an extended delay in bringing a defendant to trial, 'it is not necessary that the party accused affirmatively show prejudice. ... It is enough for the defendant to show that the prosecution has been unreasonably delayed. It will not be presumed that good cause for the delay in fact existed. If there was any good cause it was for the prosecution to show it.' (Harris v. Municipal Court, supra, 209 Cal. 55, 64; see also In re

Begerow, supra, 133 Cal. 349, 354.)"

Barker v. Municipal Court, 64 Cal. (2d) / 806, at page 812. 3/

* * *

3. Where There Is No Legitimate Reason For Delay And The Defendant Is Prejudiced Thereby, He Is Denied Due Process Of Law.

"The accused has substantial rights which must be protected, and the delay between the alleged offense and the time of arrest must not result in a deprivation of due process.* Delaying the arrest of the accused may hinder his ability to recall or reconstruct his whereabouts at the time the alleged offense occurred. ... There is no doubt that under certain curcumstances the delay in filing the accusation makes it difficult or impossible for the accused to adequately prepare his defense. We agree with the statement in Powell v. United States, 352 F. 2d 705, 708 (122 App. D. C. 229),

that 'an accused must show two things in order to invoke an exercise of our supervisoty power because of alleged basic "unfairness" [citation omitted] resulting from claimed delay in his arrest: that there was (1) no legitimate reason for the delay, and that he was (2) prejudiced by the delay.'" (Emphasis Ours.)

People v. Wright, 2 Cal.App. (3d) 732, at pages 736-737.

* * *

"In order to establish a denial of due process based upon a delay short of the statutory period the defendant must show that there / was no legitimate 4/ reason for the delay and that he was prejudiced by it."

People v. Dontanville, 10 Cal. App. (3d) 783, at page 789.

* * *

"'We think that an accused must show two things in order to invoke an exercise of our

supervisory power because of alleged basic "unfairness", cf. Ross v. United States, infra, note 6, resulting from claimed delay in his arrest: That there was no legitimate reason for the delay, and that he was prejudiced by the delay. Powell v. United States, 352 F. 2d 705, 708 (D. C. Cir.)"

People v. Gilmore, 239 Cal. App. (2d) 125, at page 129.

* * *

"In some cases, the length of that delay [delay between date of alleged offense and date of arrest] may be so great that prejudice can be presumed unless the Government can show otherwise. But we cannot presume prejudice after a delay of five months. Some showing is necessary.

"That is not to say that prejudice must be proved beyond a reasonable doubt, or even by a preponderance of the evidence. In Ross, [349 F. 2d 210] we held it sufficient that the accused was able to establish only 'a plausible claim of inability to recall or reconstruct the events of the day of the offense'. Ross v. United States, supra,

note 1, 349 F. 2d at 215. / 5/

"Since the delay was the clear responsibility of the Government and was arranged solely for its advantage, the accused should not be forced to labor under an exacting burden of proof, but he must still show a plausible claim."

Jackson v. U. S., 351 F. 2d 821, at pages 822-823 (1965, D. C. Cir.)

* * *

"Such a basis for decision is wholly unsatisfactory and denies the defendant the essentials of a fair hearing, where through the Government's inaction, he was deprived of the opportunity to secure Jones as a witness. ... The twenty-month delay in notifying Curry of the pendency of these charges is responsible for his present inability to locate Jones, no plausible justification has been offered for the delay. ... [citing U. S. v. Parrot, 248 F. Supp. 196, 204] [T]he Government has not adequately justified the delay. As to the twenty-two months' delay wherein the matter was in the hands of the United States

Attorney, the only excuse that the Government has tendered is the pressure of the work in the U. S. Attorney's Office.'"

United States v. Curry, 284 F. Supp. 458, at page 467 (1968, N. D. Ill.)

* * *

"In addition to exerting every effort to require the State to try him there is present in this record abundant evidence of actual prejudice to petitioner in the death of two potential witnesses, unavailability of another, and the loss of police records. This is sufficient to make a remand on that issue unnecessary. We therefore reverse and remand to the District/ 6/ Court of Appeal of Florida, First District, with directions to vacate the judgment appealed from and direct the dismissal of any proceedings arising out of the charges on which that judgment was based."

Dickey v. Florida, 298 U. S. 30, at page 32.

* * *

4. The Effect Of The Conduct Of The Prosecution Was To Deny The Defendant's Right To A Speedy Trial Because The Delay Was Unreasonable And Resulted In Prejudice To The Defendant.

> "'The right to a speedy trial is a "fundamental right granted to the accused and ... the policy of the law since the time of the promulgation of Magna Charta and the Habeas Corpus Act." (Harris v. Municipal Court (1930) 209 Ca. 55, 60-61 [285 P. 699].) The function of this vital constitutional provision is "to protect those accused of crime against possible delay, caused either by willful oppression, or the neglect of the state or its officers." ...
>
> "The Legislature has enacted various specific provisions implementing the constitutional right to a speedy trial. For example, Penal Code sections 799-801 impose limitations on the time for commencing criminal actions; Penal Code section 825 imposes a time limit within which a defendant must be taken before a magistrate; Penal Code section 739 imposes a time limit within which an information must be filed; and Penal Code sections 1381-1387 establish standards

for the dismissal of an action for want of prosecution. Although none of the above legislative provisions deal with a pre-arrest delay, it does not follow that there is no remedy if such delay results in the denial of the right to a speedy trial. As stated in Barker v. Municipal Court, supra, 64 Cal. 2d 806, / 812, "While the courts 7/ have regularly adopted and enforced legislative interpretation of the constitutional provision for speedy trial, the constitutional provision "is self-executing". (Harris v. Municipal Court, supra, 209 Cal. 55, 60.) "[I]t is not necessary to have specific legislation to carry into effect section 13 of article I. ..." (Rost v. Municipal Court (1960) 184 Cal.App. 2d 507, 511 [7 Cal. Rptr. 869, 85 A.L.F. 2d 974].) The provisions of the Penal Code are merely "supplementary to and a construction of' the Constitution." (People v. Wilson, supra, 60 Cal. 2d 139, 145; People v. Godlewski, 22 Cal. 2d 677, 682 [140 P. 2d 381].) It is thus unnecessary for petitioner, in asserting his constitutional right to a speedy trial, to rely on specific statutory provisions applicable to pre-arrest delays.

...

"The argument has also been made that the guarantee of a speedy

trial should not be applied to pre-arrest delays because the allowable period between the offense and initiation of prosecution is controlled exclusively by the applicable statute of limitations. The statute of limitations, however cannot be invoked to curtail the self-executing constitutional guarantee of the right to a speedy trial. Although the statute of limitations is the primary legislative guarantee against bringing overly stale criminal charges, it is not the sole guarantee. It imposes an outside limit on the initiation of a prosecution regardless of how justified the delay may have been.

...

"Petitioner was clearly prejudiced. The most obvious prejudicial effect of the long pre-arrest delay was to seriously impair his ability to recall and to secure evidence of his activities at the time of the events in question. ...

...

"...in the instant case prejudice and / unreasonable delay clearly 8/ appear, and we conclude that petitioner was denied his right to a speedy trial."

Jones v. Superior Court, 3 Cal.

(3d) 734, at pages 738-741.

* * *

See also, People v. Superior Court, 5 Cal. App. 3d 698, at pages 703-704; People v. Neustice, 24 Cal. App. 3d 178, at page 189; People v. Williamson, 26 Cal. App. 3d 740, at page 742.

* * *

Respectfully submitted,

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SUPERIOR COURT OF CALIFORNIA,

COUNTY OF STANISLAUS

---oOo---

| | |
|---|---|
| THE PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff,<br><br>vs.<br><br>JOSEPH BELLIZZI,<br><br>Defendant. | NO. 122338<br><br>DEFENDANT'S FURTHER MEMORANDUM OF POINTS AND AUTHORITIES |

In People v. Kiihoa, 53 Cal. (2d) 748, defendant was charged with sales of narcotics. It was alleged the transaction occurred on April 23, 1958. He was first arrested 84 days later on July 16, 1958, concerning the alleged violation but was released. The release was designed

to protect an informer's identity. Subsequently, he was rearrested on September 29, 1958, some 5 months and 6 days after the commission of the alleged offense. Upon conviction, defendant appealed alleging in substance that he had been denied a fair trial because a material witness was not produced upon the defendant's motion, the motion having been / denied. 1/ In reversing the conviction, the Supreme Court had this to say at page 752:

> "The narrow question is the present case is whether the concept of a fair trial has been denied where the prosecution is allowed to arrange to withhold prosecution of a suspect during such time as a material witness might be available, and proceed to trial only when that witness is believed to be out of the jurisdiction and not available to testify.
>
> "The intentional suppression of material evidence by the state would, of course, be a denial of a fair trial and due process. This could, in some circumstances, be manifest by a failure of the prosecution to call certain witnesses. (Curtis v. Rives,

123 F.2d 936, 938 [75 App. D.C. 66]; cf. Mooney v. Holohan, 294 U.S. 103 [55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406].) Such a denial would likewise exist where the prosecution was allowed to control the course of proceedings in a manner which would prevent the accused from presenting material evidence."

Note the similarity in result with the case of Dickey v. Florida, 298 U.S. 30, at page 32, involving potential witnesses unavailable to the defendant.

In our case, it is alleged the offense was committed on January 31, 1973. Over 7 1/2 months have elapsed and defendant has not been tried. The Court has already determined (by its Certificate) that Evans is a material witness. He is not presently available. The delay was for the convenience of the government. It has prejudiced the defendant. Whatever the motive / of 2/ the People, as stated in Kiihoa, page 754:

"Such motives and purposes cannot prevail when, as here, they inevitably result, intentionally or unintentionally, in depriving the defendant of a fair trial. It has been said that the basic issue lies in a balance of the public interest in protecting the flow of information against the individual's right to prepare his defense. (Roviaro v. United States, 353 U.S. 53, 62 [77 S.Ct. 623, 1 L.Ed.2d 639].) In the present circumstances that issue must be resolved in favor of the preservation of individual rights."

The comments of the Judge at the time of the preliminary hearing in this matter might also be appropriate. They appear at page 79 of the transcript of the preliminary examination as follows:

"I'd like to say, Mr. Elledge, if I assume this matter gets to the stage of being set for trial and that witness is not available at that time, notwithstanding additional evidence to produce him by either the People or you, I am sure that People ought to, at this moment, be concerned with trying to locate Mr. Evans, then perhaps you will get a different

ruling upon review."

Respectfully submitted,

LAW OFFICES OF ROBERT R. ELLEDGE

By ROBERT R. ELLEDGE
Attorneys for Defendant 3/

# APPENDIX F

THE COURT: What's the conditional waiver?

MR. ELLEDGE: Without prejudice to our motion based on due-process ground and speedy-trial ground that this matter should be dismissed. Let me say I have no secrets.

THE COURT: Are you talking about rights that have accrued up to this date?

MR. ELLEDGE: Right. That is the understanding we had last time, Judge. Let me say this to you --

THE COURT: Is that acceptable to you, Mr. McAllister?

MR. STAHL (District Attorney): I don't want to intervene, but if Mr. Elledge wants a continuance he can't have his cake and eat it, too. If the Motion for Dismissal has been denied, we have a right to go to trial. It's as clear as that, and we want to go to trial. If he wants to move for a continuance that's

his move.

MR. ELLEDGE: I am trying to accommodate the Court's suggestion. Under those circumstances should I be deemed to be moving for one?

THE COURT: All right. My ruling, frankly, was conditional and I was indicating to you that I would grant the continuance so long as it was understood that the continuance doesn't increase your client's rights. Isn't that what we are talking about? You either are going to attempt to accrue additional rights by reason of a continuance or you're not from that date on. 66/

MR. ELLEDGE: The cases that deal with speedy-trial situations and with due-process problems among other things are directly related to the nature and extent of delay, so if you're saying now because we have had this delay once, plus all of the business we had on the first charge,

which was an Indictment, which was dismissed, that by putting it over to now to the 12th of November we are not suffering any more prejudice, I certainly can't concur in that.

THE COURT: Then I can't grant your continuance request and I will have to stand with the ruling denying your Motion.

MR. ELLEDGE: There's only one more thing. I want an opportunity to get a Writ of Prohibition.

AFFIDAVIT OF SERVICE

I, LOUISE M. ARMSTRONG, a stenographer in the office of ROBERT R. ELLEDGE, the attorney of record for JOSEPH BELLIZZI, Petitioner herein, depose and say that on the 22nd day of November, 1974, I served three copies of the foregoing PETITION FOR A WRIT OF CERTIORARI, on the several parties thereto as follows:

On the Superior Court of Stanislaus County by mailing three copies in a duly addressed envelope, with postage prepaid, to Jeremy C. Cook, Judge, Superior Court, County of Stanislaus, Courthouse, Modesto, California 95354.

On the County of Stanislaus by mailing three copies in a duly addressed envelope, with postage prepaid, to Donald N. Stahl, District Attorney, County of Stanislaus, Courthouse, Modesto, California 95354.

On the People of the State of California by mailing three copies in a duly addressed envelope with postage prepaid, to Evelle J. Younger, Attorney General, 500 Wells Fargo Bank Building, 5th and Capitol Mall, Sacramento, California 95814.

All parties required to be served have been served.

Louise M. Armstrong

LOUISE M. ARMSTRONG

Subscribed to me before me at Modesto, California this 22nd day of November, 1974.

Notary Public

[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]

Supreme Court, U.S.
FILED
MAR 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-649

JOSEPH BELLIZZI,
*Petitioner,*

v.

SUPERIOR COURT OF STANISLAUS COUNTY,
*Respondent,*

THE PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

## BRIEF OF REAL PARTY IN INTEREST PEOPLE OF THE STATE OF CALIFORNIA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-649

JOSEPH BELLIZZI,
*Petitioner,*

v.

SUPERIOR COURT OF STANISLAUS COUNTY,
*Respondent,*

THE PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

## BRIEF OF REAL PARTY IN INTEREST PEOPLE OF THE STATE OF CALIFORNIA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

## OPINIONS BELOW

On January 30, 1974, the California Court of Appeal, Fifth Appellate District, issued its opinion granting a preemptory writ of prohibition restraining respondent superior court from further proceeding with the action against petitioner other than to order a dismissal of that action (*see* Appendix B to the petition).

On July 11, 1974, the California Supreme Court denied the petition for writ of prohibition (*see* Appendix A to the petition).

## JURISDICTION

Petitioner asserts jurisdiction under 28 U.S.C. section 1257(3).

## QUESTION PRESENTED

Whether the rejection of the petitioner's speedy trial claim because the only prejudice to petitioner's defense arose from his own negligence presents a substantial federal question under either the due process clause of the Fourteenth Amendment or the speedy trial provision of the Sixth Amendment applied to the states through the due process clause of the Fourteenth Amendment.

## CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES OF COURT INVOLVED

The following materials are set out in the Appendix: California Health and Safety Code sections 11501 and 11910; California Evidence Code sections 1041 and 1042(d); California Penal Code sections 1238(a)(8), 1239(a), 1382 subd. 2, 1387 and 1392; California Rules of Court, Rule 31(a).

## STATEMENT OF THE CASE

On April 18, 1973, the Grand Jury of Stanislaus County issued an indictment charging petitioner Joseph Bellizzi with sale of heroin on or about January 31, 1973, in violation of California Health and Safety Code section 11501 (now section 11352) and two prior convictions, to wit, violation of California Health and Safety Code section 11910 (possession of a restricted dangerous drug) on April 10, 1970, in Alameda County, and violation of California Health

and Safety Code section 11501 (sale of heroin) on June 4, 1970, in Stanislaus County. (Exhibit A).[1]

On April 20, 1973, petitioner was arrested pursuant to a warrant issued on the basis of said indictment.

On April 27, 1973, petitioner was arraigned in the Superior Court of California in and for the County of Stanislaus at which time he entered a plea of not guilty to the charge of violation of Health and Safety Code section 11501 and denied both prior convictions.

On May 31, 1973, a jury trial was scheduled to begin on June 4, 1973. Petitioner also made a motion for pretrial discovery concerning the whereabouts of police informant Morrow. Petitioner's attorney, Mr. Elledge, wanted to talk to Morrow before the trial. Deputy District Attorney Milam advised Judge Halley that Morrow would be made available for trial, but that a satisfactory address was not then available. Morrow was regularly present at the police department where the district attorney's office served him with subpoenas. The hearing on petitioner's motion was put over until the next day. (Exhibit G).

On June 1, 1973, Milam and petitioner's attorney discussed the matter further before Judge Halley. Mr. Milam had received another address for Morrow which turned out not to be current. Petitioner's attorney requested Judge Halley to judicially notice that Morrow was the key informing witness for a

[1] Citations to exhibits refer to the exhibits which Real Party in Interest has submitted to this Court under separate cover. All of these exhibits were appended to the various briefs filed with the California Court of Appeal for the Fifth District and were before the California Supreme Court.

large number of indictments. He continued with his argument:

"MR. ELLEDGE: . . . Now under the provisions of the much later case, among others, which I have cited in my Points and Authorities, it's incumbent upon the People to maintain contact with the witness. They know it's important to them and perhaps to the respective Defendant, and just seems to me that—let me say it taxes my credulity to believe that the Police Department can't provide accurate information as to where this witness is.

"MR. MILAM: Your Honor, it's my understanding that the cases mentioned by Counsel require the maintenance of contact with the witness in order that a witness may be produced. That witness will be produced for trial. *It's my intention to call the witness to be produced tomorrow for Mr. Elledge to speak to him at his office alone.* I can't guarantee to effect that, but I fully expect that to occur.

"MR. ELLEDGE: *If in fact you do that, this will meet my requirement.* I will certainly make myself available so that there will be no call for His Honor to act upon the authorities I have cited.

"THE COURT: I have read them. *I'm going to do this: I'm going to order either you give him a valid address or produce it for him,* and if in the event this is produced, I will entertain a motion for a continuance of this trial. It's set for Monday, isn't it?

"MR. ELLEDGE: That's correct, and I might state, Your Honor, that our intention is to try it on Monday.

"THE COURT: That's fine.

"All right.

"MR. ELLEDGE: Thank you. *I will prepare an order accordingly.*

"THE COURT: Let the record show Mr. Bellizzi is present.

"MR. ELLEDGE: As I understand, Mr. Milam represented that all witnesses' statements have been provided for, is that correct?

"MR. MILAM: You have the things I mentioned in court, all the witnesses' statements have been provided for. There are no original notes.

"MR ELLEDGE: Fine. Thank you.

"THE COURT: All right." (Emphasis supplied.) (Exhibit H).

The substance of this colloquy was that Mr. Milam offered to produce Morrow, but not Morrow's current address. Petitioner's attorney stated that he found such an offer satisfactory. Judge Halley made an oral order in somewhat ambiguous language which apparently required the prosecution to produce either Morrow's current address *or* alternatively the witness Morrow himself. The preceding discussion between Mr. Milam and Mr. Elledge establishes that such an alternative was available. Taking this view of the oral order, the prosecution accordingly made Morrow available at Mr. Elledge's office at one o'clock on the afternoon of Saturday, June 2, where he was examined for approximately one and one-half hours. (Exhibits C, D, E and H).

On Monday morning, June 4, Judge Halley signed the written discovery order, which was apparently

prepared by petitioner's attorney. The written discovery order apparently required the production of Morrow's current address with no alternative for production of the witness. Whether petitioner's attorney or Judge Halley recalled that Monday morning, the exact terms of the oral order made the previous Friday morning is not disclosed by the record. But, apparently the prosecution did not receive a copy of the written order until the morning of June 4. Deputy District Attorney McAllister, who appeared for the prosecution on June 4, did not. McAllister did not appear at the hearing on June 1, and it was his understanding without having heard the oral order that the order was in the alternative, as explained above. (Exhibits E and I).

At the hearing on June 4 before Judge Cook, who was also absent from the hearing on June 1, petitioner's attorney made a motion for dismissal of the action on the basis of the prosecution's failure to comply with Judge Halley's *written* order. McAllister admitted that the prosecution's production of Morrow for examination did not comply with the written order, but noted that Morrow had been produced and would be produced again if necessary. When Judge Cook stated again that Judge Halley's written order had not been complied with, McAllister requested a hearing pursuant to California Evidence Code section 1042(d) to show cause to Judge Cook why Morrow's current address should not be released; there were valid reasons for not giving out Morrow's current address. (Exhibit I).

"THE COURT: . . . You may have your good reasons for it but the thing is the order has been made and it's my understanding Mr. Elledge's motion under the circumstances is good. I'm trying to see if you agree or disagree.

"MR. McALLISTER: I disagree with that because I think we have done something better than giving him a current address. We made him available in person.

"MR. ELLEDGE: If the Court that heard the motion felt that was a sufficient substitute the order wouldn't be made.

"MR. McALLISTER: I am not aware the Court who heard the motion knew that is what we were going to do.

"THE COURT: That could have been offered as an alternate at that time.

"MR. ELLEDGE: The matter was fully recorded. There was no suggestion or excuse made for not providing the address. The matter was heard. No evidence was adduced to the contrary or in conflict with the application and the case cited in support of my position at this moment was cited at that time. No authority to the contrary was cited by opposing counsel.

"THE COURT: I don't think I have any choice. The order has not been complied with. You tell me the District Attorney will not comply with it. The motion to dismiss will be granted.

"MR. ELLEDGE: Thank you.

"THE COURT: Bail will be exonerated."

(Exhibit I).

The prosecution did not further press its interpretation of the oral discovery order or its claim for a

hearing pursuant to Evidence Code section 1042(d). Instead, the prosecution chose to refile the charges against petitioner. Accordingly a complaint was promptly filed on June 6. The complaint charged petitioner with the same offense and prior convictions as alleged in the earlier indictment.

On June 12, 1973, petitioner was arrested pursuant to a warrant issued on said complaint.

On June 13, 1973, petitioner was arraigned on said complaint and entered a plea of not guilty to the charge of violation of Health and Safety Code section 11501 and denied the prior convictions.

On June 29, 1973, petitioner's motion to dismiss the action was denied.

On July 20, 1973, an information was filed in the Superior Court of Stanislaus County charging petitioner with the same offense and the same prior convictions alleged in the complaint.

On July 23, 1973, petitioner was arraigned on said information, entered a plea of not guilty to the charge and denied the prior convictions.

On August 24, 1973, petitioner admitted the prior convictions.

On August 31, 1973, petitioner filed a notice of motion for dismissal. Said motion was denied on September 7, 1973. (Exhibit M).

On September 17, 1973, the date set for trial, a continuance was granted at petitioner's request and the trial date was set for the following day. (Exhibit N).

On September 18, 1973, petitioner abruptly renewed

his motion to dismiss which was then denied. Petitioner's motion for a one-day continuance was granted. (Exhibit O).

On September 19, 1973, petitioner's motion for a continuance was granted, and the trial date was reset to October 23, 1973. (Exhibit P).

On October 18, 1973, petitioner's renewed motion to dismiss the information was denied. (Exhibit Q).

On October 23, 1973, petitioner requested time to file a petition for writ of prohibition. (See Appendix F to the Petition). On October 24, 1973, petitioner filed a petition for a writ of prohibition or mandate in the California Court of Appeal, Fifth Appellate District. On November 16, 1973, said court issued an order to show cause.

On January 30, 1974, said court issued its opinion granting the writ. On February 4, 1974, said court issued an order for publication of said opinion. On February 14, 1974, said court denied Real Party in Interest's petition for rehearing.

On March 27, 1974, the California Supreme Court granted Real Party in Interest's petition for hearing.

On July 11, 1974, the California Supreme Court issued its opinion denying the writ. On August 28, 1974, said court denied petitioner's petition for a rehearing.

On November 25, 1974, petitioner filed the instant petition for a writ of certiorari with this Court.

## STATEMENT OF THE FACTS

On January 31, 1973, at about 7:10 p.m. Officers Chet Stygar and Skip McKune and Detective Jim Boyd of the Modesto Police Department searched confidential police agent #19 (later identified as David Wayne Morrow) and his car, wired Morrow with a transmitter, and gave him $50.00. Morrow had no narcotics or other money. Stygar, McKune and Boyd followed Morrow to 136 James Street, Modesto, where Morrow entered petitioner's residence. (Exhibits A and B).

Morrow asked if petitioner knew where he could get some heroin. Petitioner said, "Yes, I have some for sale." Petitioner explained that he had sold his last balloon, but had some left for himself. Petitioner went to the bedroom to get it. Morrow called out, "I don't want it all lactosed, Joe." Petitioner responded, "Come on in and I will show you what I have left." Petitioner put the powder in a red balloon for which Morrow paid him $40.00. A tape recording was made of these conversations between petitioner and Morrow. (Exhibits A and B).

Morrow returned to the officers and gave them the red balloon, which was subsequently analyzed by James Streeter, a criminalist for the California Department of Justice, and found to contain heroin. (Exhibits A and B).

A friend of petitioner, Harold Evans, was allegedly present at petitioner's residence during part of the time that Morrow was there. Petitioner allegedly ar-

ranged with his friend Evans for Evans to be available for petitioner's trial on an informal (unsubpoenaed) basis. On June 4, 1973, petitioner allegedly told Evans that the charges against him had been dismissed. (Exhibit L).

After petitioner allegedly spoke to Evans on June 4, 1973, Evans apparently disappeared. He was not located for the pending trial on the refiled charges despite the prosecution's voluntary attempts to locate him through Evans' mother, Evans' California probation officer and Evans' Oregon supervising probation officer. (Exhibit F).

## SUMMARY OF ARGUMENTS

Petitioner has failed to raise any substantial federal question as to any Fourteenth Amendment due process rights in connection with the disappearance of his friend Evans and his unavailability at trial. Petitioner's attempt to enlarge upon the due process rights available to him under the speedy trial provision of the Sixth Amendment by claiming additional due process rights must fail. Since petitioner was an "accused" at the time he allegedly suffered prejudice, he is entitled to whatever process is due him as an "accused". It would therefore be inappropriate for this Court to extend similar due process protections to the period prior to arrest on the facts of the instant case. Nor does the record disclose any violation of petitioner's due process rights by reason of the prosecution's alleged oppressive conduct.

Petitioner has also failed to raise any substantial federal question as to his rights under the speedy trial provision of the Sixth Amendment. The California Supreme Court fully considered petitioner's speedy trial claim on the basis of the state law—both statutory and constitutional—and indicated that the same result obtained from the application of the appropriate federal constitutional test of *Barker* v. *Wingo,* 407 U.S. 514, 530–533 (1972). No substantial federal question is raised because the California Supreme Court correctly applied the applicable federal law test to the facts of the instant case.

## ARGUMENT

### I. Petitioner fails to raise any substantial federal question under the due process clause of the Fourteenth Amendment

Petitioner has failed to establish that he is entitled to relief on the basis of Fourteenth Amendment due process rights resulting from the disappearance of his friend Evans and his unavailability at trial. Petitioner relies upon cases of the California state courts and federal courts of the District of Columbia Circuit in which those courts, respectfully, have exercised supervisory powers pursuant to the due process clauses of the California and United States Constitutions to provide relief to criminal defendants whose cases have been prejudiced by so-called prearrest or preindictment delay during the period before such a defendant became an "accused" within the meaning of the Sixth Amendment. Such supervisory power need not be

exercised in the instant case because petitioner was an "accused" when the alleged prejudice occurred. Any rights to which petitioner is entitled are thus fully protected by the application of the speedy trial provision of the Sixth Amendment.

Petitioner's primary reliance is placed upon the case of *Dickey* v. *Florida*, 398 U.S. 30 (1970). The decision in that case rests squarely upon the speedy trial provision of the Sixth Amendment, and thus does not support petitioner's claim of an independent due process right.

Petitioner further relies on a line of cases from the District of Columbia Circuit: *Ross* v. *United States*, 349 F.2d 210 (1965); *Powell* v. *United States*, 352 F.2d 705 (1965); *Jackson* v. *United States*, 351 F.2d 821 (1965); *United States* v. *Curry*, 284 F.Supp. 458 (1966). In each of those cases the federal court applied its federal supervisory powers to a federal prosecution to give a defendant enlarged due process rights to cover the period before he became an "accused" within the meaning of the Sixth Amendment. *See, United States* v. *Marion*, 404 U.S. 307, 313–320 (1971). Such additional protection is unnecessary when the defendant was an "accused" at the time the alleged prejudice occurred.

As noted in the California Supreme Court's opinion, at 12 Cal.3d 37, the trial court's order of dismissal on June 4, 1973, was not a final order under applicable state law. The order did not become final until the People's time for appeal had expired. That

period was 60 days in the instant case. California Penal Code sections 1238(a)(8) and 1239(a); California Rules of Court, Rule 31(a). Until the order of dismissal became final, the defendant remained an "accused" within the meaning of the Sixth Amendment. Petitioner knew or should have known that the charges against him could be revived, either by reversal of the order of dismissal on appeal or by the People's recharging him with the same offense, as was in fact done, pursuant to California Penal Code section 1387. *People* v. *Uhlemann*, 9 Cal.3d 662 (1973); *People* v. *Williams*, 71 Cal.2d 614, 622–623 (1969).

For the same reason, i.e., that petitioner was an "accused" when his friend disappeared, there is no need for this Court to implement the prearrest and preindictment due process rights which California courts already apply to the period before a defendant has been "accused". *People* v. *Archerd*, 3 Cal.3d 615 (1970); *Jones* v. *Superior Court*, 3 Cal.3d 734 (1970); *People* v. *Vanderberg*, 32 Cal.App.3d 5 6 (1973); *Penney* v. *Superior Court*, 28 Cal.App.3d 941 (1972); *People* v. *Wright*, 2 Cal.App.3d 732 (1969).

Nor does petitioner have a legitimate claim that his due process rights were violated by reason of the prosecution's alleged intentional suppression of defense evidence. The California Supreme Court properly determined that petitioner's friend was unavailable as the resul' of petitioner's own negligence. The evidence here shows that the prosecution never in-

tended to hinder the petitioner's ability to present his defense and that the disappearance of petitioner's friend was the inevitable result of the petitioner's actions—not the prosecution's. *In re Ferguson*, 5 Cal.3d 525, 532 (1971). Clearly the prosecution must bear the burden of using reasonable efforts to locate and produce its own agents who might give testimony favorable to the defendant. *Brady* v. *Maryland*, 373 U.S. 83 (1963); *Roviaro* v. *United States*, 353 U.S. 53 (1957); *People* v. *Goliday*, 8 Cal.3d 771 (1973); *Eleazor* v. *Superior Court*, 1 Cal.3d 847 (1970); *People* v. *Kiihoa*, 53 Cal.2d 748 (1960); *Harris* v. *Superior Court*, 35 Cal.App.3d 24 (1973). It is equally clear that the defendant — and not the prosecution — must bear the burden of locating and producing his own witnesses. Inability of the defense to locate its own witnesses is not grounds for dismissal. *People* v. *Kirkpatrick*, 7 Cal.3d 480 (1972).

In the instant case there is no indication that the prosecution knew of Evans' whereabouts or contemplated his disappearance when the original indictment was dismissed. Petitioner was the one who contacted his friend and terminated the informal agreement whereby Evans would be available to testify at petitioner's trial. Since petitioner knew or should have known that the charges against him could be revived, he must bear the responsibility for Evans' unavailability. Petitioner should not profit from his own negligence; nor should he be permitted to manufacture his own prejudice.

Real Party in Interest submits that petitioner fails to raise any substantial federal question under the due process clause of the Fourteenth Amendment resulting from the disappearance of Evans and his unavailability at trial.

## II. Petitioner fails to raise any substantial federal question under the speedy trial provision of the Sixth Amendment

Petitioner's claims that his right to a speedy trial was violated under California Penal Code section 1382,[2] subd. 2, and the California Constitution are clearly not matters subject to review by this Court. *Eisenstadt* v. *Baird*, 405 U.S. 438, 442 (1972). Petitioner was given full consideration of these state claims under those protections of state law which supplement the protections of federal law. The California Supreme Court properly rejected those claims for the reasons given in its opinion, at 12 Cal.3d 38.

Petitioner's claim that his federal speedy trial right was violated does not raise any substantial federal question as to the test to be applied. The current test is that enunciated in *Barker* v. *Wingo*, 407 U.S. 514, 530–533 (1972). The California Supreme Court recognized that *Barker* v. *Wingo* provides the applicable federal test. See also, *Sykes* v. *Superior Court*, 9 Cal. 3d 83, 93 (1973), in which the California Supreme Court considered the result which would be reached under the *Barker* test even where that test was not

[2] Petitioner's citation of California Penal Code section 1392 is clearly in error since that section concerns service of a summons upon a corporate defendant.

applicable because the defendant was entitled to relief on state law grounds. Since the California Supreme Court applied the proper federal test, a substantial federal question could result only from a misapplication of that test to the facts of the case. As will be demonstrated below, the California Supreme Court reached the proper result.

The first factor to be considered in the *Barker* balancing test is the length of the delay. Petitioner first became an "accused" when he was arrested on April 20, 1973, on the basis of a warrant issued on an indictment issued on April 18, 1973. Prior to June 4, 1973, the date set for petitioner's trial, he was on bail. Petitioner points to no specific prejudice to him or to his defense arising during that period. Nor did he suffer any lengthy pretrial incarceration during the period he was released on bail. The relevant period of delay began on June 4, 1973. A new complaint was promptly filed against petitioner on June 6, 1973, and he was rearrested on June 12, 1973. Subsequently, petitioner's trial date was set for September 17, 1973. Although the trial court thereafter granted petitioner several continuances to attempt to locate his witness and to make pretrial motions, the prosecution was at all times prepared to proceed to trial. Real Party in Interest submits that the delay complained of during which petitioner was allegedly prejudiced was at most only eight days, from June 4 to June 12, 1973.

The second consideration under the *Barker* test is the prosecution's justification for the delay. First, as

to the two days which were taken to file the new complaint and the additional six days taken to rearrest petitioner, Real Party in Interest submits that the time periods were in no way unreasonable. The prosecution could hardly have acted more quickly. Moreover, under the applicable state law, as explained in Argument I, *supra*, the prosecution had 60 days from June 4 within which to file a timely notice of appeal from the order of dismissal. Had the prosecution elected to appeal much more time would have been consumed in the appellate process. Thus, the prosecution acted not only in a timely fashion, but with much more expeditious procedures than were actually required. In this regard, *see United States* v. *Ewell*, 383 U.S. 110 (1966). Second, the prosecution did not act unreasonably in suffering the order of dismissal. As explained above in the statement of the case, the prosecution sought to protect police informant Morrow by keeping his current address confidential. The prosecution guaranteed Morrow's attendance at the trial. The prosecution also made Morrow available to petitioner's attorney at his office for questioning after ascertaining in open court that such a procedure would be satisfactory to petitioner. Petitioner had ample opportunity to conduct his discovery and never advanced any reason for needing Morrow's current address.[3] Suddenly on Monday morning, June 4, the

[3] Real Party in Interest suggests that even if Morrow's address might conceivably have been of use to petitioner, his address at the time of the sale on January 31, 1973, and not his address on June 1, 1973, would have been the only address even arguably relevant to petitioner's case. Petitioner was not

date set for trial, petitioner's attorney produced a written discovery order which he had prepared requiring the prosecution to produce Morrow's current address. When the deputy district attorney argued that the prosecution had substantially complied with the written order—believed it had actually complied with the oral order—and ought to be given an opportunity to show cause why the current address should not be disclosed, petitioner demanded that the indictment be dismissed immediately even though the prosecution offered to produce Morrow again for further pretrial examination if necessary. Despite its valid police purpose for keeping the current address confidential and its reasonable belief that it had given petitioner the discovery due him under the actual oral discovery order, the prosecution was momentarily stymied in its attempt to give petitioner his timely trial. At no time did the prosecution seek to hamper petitioner's defense or gain an unwarranted advantage. Real Party in Interest submits that the delay in recharging petitioner was minimal and fully justified by the exigencies of the predicament in which the deputy district attorney suddenly found himself.

The third element of the *Barker* test is the defendant's assertions of his right. When the prosecution sought to bring petitioner to trial on June 4 he demanded an immediate dismissal of the indictment

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engaged in cross-examining the witness and failed to suggest that there was any legitimate purpose to be served by his learning Morrow's current address, as was done in the cases petitioner cites. *Alfred* v. *United States*, 282, U.S. 687 (1931); *People* v. *Mascarenas*, 21 Cal.App.3d 660 (1971).

rather than discussing alternate methods for the prosecution to satisfy his unreasonable discovery demands. Since that time, despite the prosecution's continuing attempts to bring petitioner to trial, he has managed to avoid prosecution by gaining time to locate his friend Evans (with which Real Party has no quarrel) and by asserting his right to a speedy trial.

The fourth and final factor of the *Barker* test is prejudice to the defendant. As noted above, petitioner was not subjected to any lengthy pretrial incarceration. Nor does he claim to have suffered any undue anxiety. His claim of prejudice is that his defense is impaired because his friend Evans has mysteriously disappeared. But petitioner was the one who contacted his friend and terminated the alleged informal agreement whereby Evans would be available to testify at petitioner's trial. Even though petitioner knew or should have known that the charges against him could be revived, he apparently made no attempt to insure his friend's continued availability. The California Supreme Court properly determined that since Evans' unavailability was primarily the result of petitioner's own negligence he should not be permitted to benefit from that negligence by weighing it in the balance as prejudice for which the prosecution was responsible. So viewed, any prejudice to petitioner for which the prosecution bears the burden of responsibility is negligible.

In sum, the California Supreme Court properly held that petitioner should be denied relief upon the basis of the applicable federal test. The relevant delay was of short duration—at most eight days.[4] The prosecution had legitimate reasons for the delay, none of which included any attempt to be oppressive, and the prosecution used the most expeditious methods available to it to minimize the delay once some delay had occurred by promptly refiling the charges against petitioner. Although petitioner has repeatedly asserted his speedy trial right as a ground for avoiding prosecution, petitioner's demand for an immediate dismissal of the indictment triggered the minimal delay which did occur at a time when petitioner could have received a trial directly. Finally, petitioner has not been prejudiced by the prosecution. Rather, he has been prejudiced by his own actions with respect to his own friend and prospective witness. On balance petitioner's demand for a dismissal of all charges against him was properly denied.

Moreover, the cases upon which petitioner relies do not support petitioner's claims. In *United States* v. *Marion*, *supra*, at 325–326, this Court held that a 38-month delay prior to indictment was not grounds for dismissal where the defendant failed to show that the delay inevitably caused him any prejudice. And in *Barker* v. *Wingo*, *supra*, *Dickey* v. *Florida*, *supra*,

[4] Even if it were assumed that the relevant period of delay was of somewhat longer duration as petitioner contends, the result of the balancing test could be no different. All periods of claimed delay were neither unreasonable nor unjustified.

*Smith* v. *Hooey*, 393 U.S. 374 (1969), and *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967), the defendants were subjected to delays amounting to several years during which charges were pending against them while they actively requested the prosecution to proceed to trial or dismiss the charges against. Those defendants suffered both extensive pretrial incarceration and the unjustified requirement of facing stale charges. Such, also, was the situation in the more recent case of *Moore* v. *Arizona*, 414 U.S. 25 (1973). But these cases do not apply to petitioner's case. He has not suffered lengthy pretrial incarceration with the prospect of facing stale charges. Nor has he ever actively sought to have the prosecution proceed to trial on the charges against him. Petitioner has tried to use his right to a speedy trial as a sword rather than a shield — as a means of cutting off prosecution rather than as a means of avoiding oppressive or untimely prosecution tactics. The cases cited above do not sanction such defense tactics; nor should such tactics be permitted. If a defendant could avoid prosecution by maneuvering the prosecution into an impossible situation and then permit his own witness to mysteriously disappear, the prosecution would be unable to proceed against many unscruplous defendants. Such a result is neither warranted by the existing cases, nor warranted by the facts of the instant one.

Real Party in Interest submits that petitioner has failed to present a substantial federal question because the California Supreme Court recognized the appli-

cable federal test of *Barker* v. *Wingo, supra,* and properly applied that test to the facts of the instant case.

## CONCLUSION

For the foregoing reasons, we respectfully submit that the instant petition for a writ of certiorari should be denied.

Respectfully submitted,

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# APPENDICES

## APPENDIX A

## CALIFORNIA HEALTH AND SAFETY CODE

11501. Except as otherwise provided in this division, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any narcotic other than marijuana, except upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in the state prison for a period of five years to life and shall not be eligible for release upon completion of sentence or on parole or any other basis until he has been imprisoned for a period of not less than three years in the state prison.

If such person has been previously convicted once of any felony offense described in this division or Section 11911, 11912, or 11913 or of any offense under the laws of any other state or the United States which, if committed in this state, would have been punishable as a felony offense described in this division or Section 11911, 11912, or 11913, the previous conviction shall be charged in the indictment or information and, if found to be true by the jury upon a jury trial or by the court upon a court trial or if admitted by the person, he shall be imprisoned in the state prison for a period of 10 years to life and shall not be eligible for release upon completion of sentence or on parole or any other basis until he has been imprisoned for a period of not less than 10 years in the state prison.

If such person has been previously convicted two or more times of any felony offense described in this division or Section 11911, 11912, or 11913 or of any offense under the laws of any other state or the United States which, if committed in this state, would have been punishable as a felony offense described in this division or Section 11911, 11912, or 11913, the previous convictions shall be charged in the indictment or information and, if found to be true by the jury upon a jury trial or by the court upon a court trial or if admitted by the person, he shall be imprisoned in the state prison for a period of 15 years to life and shall not be eligible for release upon completion of sentence or on parole or any other basis until he has been imprisoned for a period of not less than 15 years in the state prison.

## APPENDIX B

## CALIFORNIA HEALTH AND SAFETY CODE

11910. Except as otherwise provided in Article 8 (commencing with Section 4210) of Chapter 9 of Division 2 of the Business and Professions Code, every person who possesses any restricted dangerous drug, except upon the prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in the county jail for a period of not more than one year or the state prison for a period of not less than one year nor more than 10 years.

If such person has been previously convicted once of any felony offense described in this division, of a conspiracy to commit any offense described in this division, or of any offense under the laws of any other state or the United States which, if committed in this state, would have been punishable as an offense described in this division, the previous conviction shall be charged in the indictment or information and, if found to be true by the jury upon a jury trial or by the court upon a court trial or if admitted by the person, he shall be imprisoned in the state prison for a period of not less than two years or more than 20 years and shall not be eligible for release upon completion of sentence or on parole or any other basis until he has been imprisoned for a period of not less than two years in the state prison.

## APPENDIX C
## CALIFORNIA EVIDENCE CODE

1041. Privilege for identity of informer. (a) Except as provided in this section, a public entity has a privilege to refuse to disclose the identity of a person who has furnished information as provided in subdivision (b) purporting to disclose a violation of a law of the United States or of this state or of a public entity in this state, and to prevent another from disclosing such identity, if the privilege is claimed by a person authorized by the public entity to do so and:

(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or

(2) Disclosure of the identity of the informer is against the public interest because there is a necessity for preserving the confidentiality of his identity that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the identity of t' informer be disclosed in the proceeding. In determining whether disclosure of the identity of the informer is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

(b) This section applies only if the information is furnished in confidence by the informer to:

(1) A law enforcement officer;

(2) A representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated; or

(3) Any person for the purpose of transmittal to a person listed in paragraph (1) or (2).

(c) There is no privilege under this section to prevent the informer from disclosing his identity.

## APPENDIX D

## CALIFORNIA EVIDENCE CODE

1042. Adverse order or finding in certain cases

(d) When, in any such criminal proceeding, a party demands disclosure of the identity of the informant on the ground the informant is a material witness on the issue of guilt, the court shall conduct a hearing at which all parties may present evidence on the issue of disclosure. Such hearing shall be conducted outside the presence of the jury, if any. During the hearing, if the privilege provided for in Section 1041 is claimed by a person authorized to do so or if a person who is authorized to claim such privilege refuses to answer any question on the ground that the answer would tend to disclose the identity of the informant, the prosecuting attorney may request that the court hold an in camera hearing. If such a request is made, the court shall hold such a hearing outside the presence of the defendant and his counsel. At the in camera hearing, the prosecution may offer evidence which would tend to disclose or which discloses the identity of the informant to aid the court in its determination whether there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial. A reporter shall be present at the in camera hearing. Any transcription of the proceedings at the in camera hearing, as well as any physical evidence presented at the hearing, shall be ordered sealed by the court, and only a court may have access to its contents. The court shall not order disclosure, nor strike the testimony of the witness who invokes the privilege, nor dismiss the criminal proceeding, if the party offering the witness refuses to disclose the

identity of the informant, unless, based upon the evidence presented at the hearing held in the presence of the defendant and his counsel and the evidence presented at the in camera hearing, the court concludes that there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial.

## APPENDIX E

## CALIFORNIA PENAL CODE

1238. Appeal by people

(a) An appeal may be taken by the people from any of the following:

(8) An order or judgment dismissing or otherwise terminating the action before the defendant has been placed in jeopardy or where the defendant has waived jeopardy.

## APPENDIX F

## CALIFORNIA PENAL CODE

1239. Manner of taking appeal; automatic appeal from judgment of death

(a) Where an appeal lies on behalf of the defendant or the people, it may be taken by the defendant or his counsel, or by counsel for the people, in the manner provided in rules adopted by the Judicial Council.

## APPENDIX G

## CALIFORNIA PENAL CODE

1382. Failure to file information or bring case to trial within time limit; dismissal

2. When a defendant is not brought to trial in a superior court within 60 days after the finding of the indictment or filing of the information or, in case the cause is to be tried again following a mistrial, an order granting a new trial from which an appeal is not taken, or an appeal from the superior court, within 60 days after such mistrial has been declared, after entry of the order granting the new trial, or after the filing of the remittitur in the trial court; except that an action shall not be dismissed under this subdivision if it is set for trial on a date beyond the 60-day period at the request of the defendant or with his consent, express or implied, or because of his neglect or failure to appear and if the defendant is brought to trial on the date so set for trial or within 10 days thereafter.

## APPENDIX H

## CALIFORNIA PENAL CODE

1387. Dismissal as bar in misdemeanor cases, but not in felony cases

An order for the dismissal of the action, made as provided in this chapter, is a bar to any other prosecution for the same offense if it is a misdemeanor, but not if it is a felony.

## APPENDIX I

## CALIFORNIA PENAL CODE

1392. Summons; service; time

WHEN AND HOW SERVED. The summons must be served at least five days before the day of appearance fixed therein, by delivering a copy thereof and showing the original to the President or other head of the corporation, or to the Secretary, Cashier, or managing agent thereof.

## APPENDIX J

## CALIFORNIA RULES OF COURT

Rule 31. Notice of appeal

(a) [Time of filing] In the cases provided by law, an appeal is taken by filing a written notice of appeal with the clerk of the superior court within 60 days after the rendition of the judgment or the making of the order. A notice of appeal filed prior to the time prescribed therefor is premature but may, in the discretion of the reviewing court for good cause, be treated as filed immediately after the rendition of the judgment or the making of the order.

Whenever a notice of appeal is received by the clerk of the superior court after the expiration of the period prescribed for filing such notice, the clerk shall mark it "Received (date) but not filed" and advise the party seeking to file the notice that it was received but not filed because the period for filing notice of appeal had elapsed.